88-1531

Supreme Court, U.S.
FILED
MAY 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HENRY W. CUMMINGS

PETITIONER

v.

ACF INDUSTRIES ET AL

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DIVISION

HENRY W. CUMMINGS
3313 W. Adams Street
St. Charles, MO 63301
(314) 946-0076

Attorney for Petitioner

A. QUESTIONS PRESENTED

I. Where Plaintiff and Defendants entered into an oral contract wherein Plaintiff was to receive a series of annual contracts to do intellectual property legal work in return for Plaintiff resigning his position as Division Patent Counsel and Senior Patent Attorney from Defendant with tenure and where first annual contract stated that contract was renewable at the election of either party, and Plaintiff executed annual contract on oral promise by Defendants to receive additional annual contracts, and where during the term of the first annual contract, Defendants again advised Plaintiff orally that the intellectual property work was to be given exclusively to him indefinitely, and then Defendants order Plain tiff and his secretary-wife out of Defendants' premises on one day's

notice, was it an abuse of discretion for the Trial Judge not to allow Plaintiff to file a first amended complaint alleging the second promise of Defendant that the Plaintiff was to receive the intellectual property work exclusively, in the form ofa series of annual contracts; and alleging that ordering Plaintiff and his wife out of Defendant ACF on one day's notice constituted outrageous conduct according to Missouri law, where the case was not set for trial, where no discovery had occured, and where Defendants would not have been prejudiced by the filing of such an amended complaint?

Missouri Supreme Court Rule 55.33a; Lucas v. Brown & Root, Inc., 736 F(2) 1202 (8th Cir. 1984); Young v. Stensrude, 664 SW(2) 263 (Mo. App. 1984); LaBrier v. Anheuser Ford, 612 SW (2) 790 (Mo. App. 1981); Atkinson v. Be Mac Transport, Inc. 595 SW(2) 26 (Mo. App. 1980).

QUESTION II

1. Did the Missouri Court of Appeals err in affirming the Trial Court's holding that Plaintiff's petition failed to state a claim upon which relief could be granted where Plaintiff and Defendant ACF Industries agreed that if Plaintiff would resign and enter private practice, ACF would give Plaintiff a series of annual contracts to do intellectual property work for ACF, and where Plaintiff in reliance on ACF's promise executed thereof the first of these annual contracts and fully performed his part of the contract and Defendant refused to give Plaintiff additional annual contracts and ordered Plaintiff and his wife out of ACF on one day's notice and refused to allow Plaintiff to complete the contract work already agreed upon. Arie v. Intertherm Inc. 648 SW(2)142 (1983); Katz v. DannyDave Inc., 615 SW (2) 121 (MO App. 1981); Leh v. Dyer, 643 SW(2) 6J (1982); Wills v. Acorn, 636 SW(2) 142 (1982).

B. LIST OF ALL PARTIES TO THE PRECEEDING

PLAINTIFF:

HENRY W. CUMMINGS
ATTORNEY-AT-LAW
3313 W. ADAMS STREET
ST. CHARLES, MO 63301

DEFENDANTS:

1) ACF INDUSTRIES, INC.
3301 RIDER TRAIL SOUTH
BRIDGETON, MO 63045

2) MRS. PEGGY GOODE
ACF PERSONNEL SPECIALIST
3301 RIDER TRAIL SOUTH
BRIDGETON, MO 63045

3) MR. JAMES C. O'HARA
PRESIDENT
ACF INDUSTRIES, INC.
3301 RIDER TRAIL SOUTH
BRIDGETON, MO 63045

4) MR. GARY REGER
DIRECTOR OF PERSONNEL
ACF INDUSTRIES, INC.
3301 RIDER TRAIL SOUTH
BRIDGETON, MO 63045

5) DR. DAVID SUTLIFF
VICE PRESIDENT OF RESEARCH &
ENGINEERING
3301 RIDER TRAIL SOUTH
BRIDGETON, MO 63045

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C. 2. TABLE OF AUTHORITIES

Missouri Supreme Court Ryle 55.33a.

Lucas v. Brown & Root, 736 F(2) 1202 (8th Cir. 1964)

Restatement of Torts (2nd Ed) Sec. 46

Young v. Stensrude, 664 SW(2) 263

Arie v. Intherm, Inc, 648 SW (2) 142 (Mo App. 1983)

Leh v. Dyer, 643 SW(2) 65 (Mo App 1982)

Satterfield v. Missouri Dental Assn., 642 SW(2) 110.

Wills v. Acorn, 636 SW(2) 142 (Mo App 1982)

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Atkinson v. Be Mac Transport, 595 SW(2) 26 (Mo App 1980)

National Starch & Chemical Corp. v. Newman, 577 Sw(2) 99 (Mo App 1978)

International Plastics Dev. Inc. v. Monsanto,
433 SW(2) 291 (Mo Banc 1968)

Hardin v. Ray, 404 SW(2) 764 (Mo App 1966)

Presky v. Southwestern Bell Telephone,
396 SW(2) 566 (Mo 1965)

D. REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

1. On November 6, 1986, Plaintiff filed his petition in the Circuit Court of St. Louis County alleging dual breach of contract and age discrimination.

2. On December 30, 1986 Defendants joined in a motion for summary judgment or to dismiss the complaint as failing to state a claim upon which relief could be granted.

3. On January 14, 1987 the motion to dismiss was called, heard and sustained. On January 28, 1987 Plaintiff filed a motion for a new trial and a motion to file an amended petition. On February 20, 1987 Plaintiff's motion for a new trial and motion to file an amended petition was called, heard and taken under advisement.

4. On April 9, 1987 Plaintiff motion for a new trial and to file an amended petition were denied.

5. On April 16, 1987 Plaintiff filed a notice of appeal in Circuit Court to appeal to the Missouri Court of Appeals. On December 1, 1987 in a per curiam opinion the Missouri Court of Appeals sustained the trial court's holding that the complaint filed to state a claim upon which relief could be granted.

6. Plaintiff filed a motion for rehearing which was denied by the Missouri Court of Appeals, and then filed a motion for tranfer to the Missouri supreme Court which was denied on February 17, 1988.

7. This Petition for certiorari followed.

E. JURISDICTION

This Court has jurisdiction of this appeal under Supreme Court Rule 20.2, and under 28 USC 2101(C). Appeal is timely because of 28 USC 2101 (C) specifies a period of ninety days for filing of the petition for certiorari after entry of the Missouri Supreme Court judgment on February 17, 1988, denying the motion to transfer from the Missouri Court of Appeals.

F. MISSOURI SUPREME COURT RULE 55.33(a)

"A party may amend his plea once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, hemay so amend at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of the Court, or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of this amended pleading, whichever period may be the longer, unless the court otherwise orders."

G. CONCISE STATEMENT OF THE CASE

1. Plaintiff had served as Division Counsel of ACF Industries, Inc. Railcar Divisions and Senior Patent Attorney from April 1972 through July 1983. In the summer of 1983 ACF Industries was taken over by Carl Icahn and his associates.

2. The Icahn Group determined that a full-time patent attorney was not required to represent the Railcar Divisions. Plaintiff volunteered to resign in return for a promise by ACF that he would receive a series of annual contracts to do the intellectual property work, but would be free to have other clients in addition to ACF Industries.

3. The first of these contracts was executed in October of 1983 and went into effect on January 1, 1984.

4. During July of 1984 Mr. Eugene Riddle, the former Patent Counsel, came to St. Louis and advised Plaintiff, as had previously been discussed, that the

intellectual property work was his and that he, Mr. Riddle, was leaving the company.

5. After receiving this further assurance that the intellectual property work was his, Plaintiff and his wife went on a trip to the South where Plaintiff was sworn into practice in the State of Mississippi where ACF has a repair car plant at Bude, Mississippi. The trip continued to Georgia where in photographing a competitive outlet, Plaintiff risked his life on behalf of ACF to obtain pictures of this competitive outlet prior to obtaining permission of the railroad, in case the railroad would deny the right to take pictures of the car and outlet.

6. Plaintiff and his wife returned to ACF Industries inearly August 1984. On August 27 Defendant Dr. David Sutliff advised Plaintiff that his contract for 1984 had been completed and that he was not to have further intellectual property

contracts and that he and his wife should leave that day.

7. Plaintiff and his wife were shocked to receive this news after receiving the affirming news from Mr. Riddle only about a month earlier that the ACF intellectual property work was theirs exclusively.

8. The original petition which Plaintiff filed did not refer to the July meeting with Mr. Riddle or to the fact that ordering Plaintiff and his wife out of ACF Industries on one day's notice constituted outrageous conduct.

9. When trial court Judge Enright sustained Defendants' motion that the complaint failed to state a claim upon which relief could be granted, Plaintiff prepared an amended complaint and moved to file the amended complaint, alleging the additional assurance by Mr. Riddle that the intellectual property work was his and that the decision to not give Plaintiff additional contracts to do the

intellectual property work in order to bring Plaintiff out of ACF Industries on one day's notice constituted outrageous conduct. However, Judge Enright also denied Plaintiff the right to file this amended complaint.

10. It is believed that Plaintiff has not received fair treatment in the Missouri State Courts because Carl Icahn not only controls ACF Industries but also controls Trans World Airlines and both of these corporations are headquartered in Missouri. It is believed that Plaintiff has not obtained justice in Missouri because of the substantial influence that the Icahn Group has concerning the transaction of business by these two large corporations in Missouri.

11. It is for this reason that Plaintiff has petitioned for certoirari to this Court for relief of his justifible claim against ACF Industries and the Icahn Group.

QUESTION I ARGUMENT

1. Missouri Supreme Court Rule 55.33 quoted herein above provides that a party may amend his plea after a responsive pleading has been served if the action has not been placed upon the file calendar, with leave of the court and leave shall be freely given when justice so requires.

2. The doctrine of merger would not apply to the meeting between Plaintiff and former patent counsel Riddle in July 1984 when Mr. Riddle advised Plaintiff that the intellectual property work was his exclusively and indefinitely.

3. It is thus apparent that if Plaintiff had been permitted to file an amended complaint alleging the facts concerning this meeting, the doctrine of merger relied on by Defendants would no longer be applicable and Plaintiff would have an enforceable contract.

4. Furthermore, the proposed amended complaint alleged that failure by ACF and Dr. Sutliff to keep the agreement reached between Mr. Riddle and Plaintiff constituted outrageous conduct because Plaintiff and his wife were ordered out of ACF on one day's notice by Defendant David Sutliff.

5. As provided in Rule 55.33(a), the case had not been placed on the trial calendar. The rule states that leave to file an amended complaint shall be freely given when justice so requires.

6. It is believed that justice required that Plaintiff have an opportunity to amend his complaint to allege the additional meeting with Mr. Riddle and that the breach by ACF that he would not have additional contracts and that ordering Plaintiff out of ACF on one day's notice constituted outrageous conduct.

7. In Pretsky v. Southwestern Bell Telephone Company, 396 SW2d 566 (MO 1965), Missouri has recognized the tort of outrageous conduct as defined by Section 46 of the Restatement (Second) of Torts wherein it is stated: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to libaility for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." LaBrier v. Anheuser Ford, Inc., 612 SW 2d 790 (Mo. Appeals 1981).

8. The elements of this tort are: (1) Defendant's conduct must be extreme and outrageous; (2) the defendant must act in an intentional or reckless manner; and (3) by reasons of these acts, Plaintiff is caused to suffer severe emotional distress. Anheuser supra.

9. Even though the facts may be scarely overwhelming in establishing the negligent character of the act; that is, in the instant case thatthe conduct was overwhelmingly outrageous, if the characterization is reasonably debatable, a court cannot substitute its judgment on the facts for that of a jury. Atkinson v. Be-Mac Transport, Inc., 595 SW 2d 26, 29(5) (Mo. App. 1980).

10. Applying these elements tothe present factual situation, it is believed that Defendant ACF acting through Defendant Sutliff in ordering Plaintiff and his wife out of the ACF premises on a single day's notice after Mr. Riddle had assured Plaintiff and his wife that the intellectual property work was his and after Plaintiff and his wife had risked their lives for ACF in a Savannah railyard, consitutued conduct which is extreme and outrageous.

Plaintiff and his wife were shocked and disbelieving upon receiving the notification from David Sutliff that they were to leave the same day.

11. Concerning element 2 it is clear that Defendants ACF and Sutliff acted in an intentional or reckless manner. No consideration whatsoever was given by ACF and Defendant Sutliff of the effect that this would have on Plaintiff Cummings and his wife. It is to be borne in mind that Plaintiff Cummings had continuously represented ACF in the railcar area for thirteen years, and particularly in formulating defenses for patent infringement, had saved ACF literally millions of dollars. To be given notification to leave on a single day's notice after this record of successful service clearly constitutes intentional or reckless conduct on the part of ACF and Defendant Sutliff.

ARGUMENT

QUESTION II

1. The trial court dismissed Plaintiff's first petition allegedly because the doctrine of merger included the neogitations prior to the statement in the first annual contract that the document contained all understandings between the parties and that it would be renewable at the consent of either party. In general, the Court took the position therefore that ACF had a right not to renew the contract or provide Plaintiff with a new contract for 1985 because the written contract entered into between Appellant and respondent in October 1983 merged all prior and contemporaneous oral agreements into the written instrument. National Starch and Chemical Corp. v. Newman, 577 SW(2) 99 (Mo Appl. 1978) and Hardin v. Ray, 404 SW2d 764 (Mo.App. 1966).

2. These cases do not constitute current Missouri contract law. Attention is directed

to Arie v. Intertherm, 648 SW(2) 142 1983. It is to be noted that this 1983 case is much more current than the ten yearold National Starch case and the twenty year old Hardin case cited by Respondent. This case specifically holds that the terms of the contract entered into may be different than those contained in the document executed. The contract entered into included a provision that Appellant was to receive a series of annual contracts. Appellant would not have done it without that assurance both from Mr. Riddle, the patent counsel, and also from other ACF individuals that he would receive a series of annual contracts.

3. It therefore is clear that in view of the Arie case it was erroneous for the trial court to dismiss this case for failure to state a claim upon which relief could be granted. The pleadings are to be

liberally construed so as to do substantial justice, Benson v. Geller, 619 SW2d 947 (1981).

4. Thus, in Missouri new evidence is admissible to show that the evidence of the contract agreed upon between the parties is different from the wording ofthe document executed by the parties. Arie v. Intertherm, 648 SW(2) 142 (1983) (MO Court of Appl.). The Arie case involved an employment contract just as this case involves an employment contract. The trial court should have allowed Plaintiff to have a trial and put on evidence to show that the agreement reached between the parties that Plaintiff would have a series of annual contracts was different from the wording of the contract Plaintiff signed which indicates that ACF would have a right not to grant Plaintiff additional contracts if it so desired.

4. Thus Judge Enright was wrong in dismissing the original petition according to Missouri Law. Plaintiff should havehad a right to a trial in which he could have introduced evidence that the agreement reached between the parties was different from the wording of the contract executed by Plaintiff in 1983. The Missouri Court of Appeals and the Missouri Supreme Court to whom the cases were cited was also legally incorrect in affirming the trial court.

5. It is to be pointed out that Plaintiff in agreeing to resign and give up a position of tenure with ACF Industreis detrimentally relied on ACF's promise to give him the annual contracts. Detrimental reliance is specifically included in Missouri law as indicated in Katz v. Danny Dare, Inc. 651 SW(2) 121 (Mo Appl 1981). In this case Mr. Katz resigned from Danny Dare just as Plaintiff resigned from ACF Industries. In the Danny Dare case relief

was granted to Mr. Katz on the theory of wide contract in law.

6. Thus it is believed that Judge Enright was wrong in the first place in dismissing the original complaint because Missouri law has enunciated in Katz v. Danny Dare provided that the original petition stated a cause of action at least in quasi contract. Therefore, Judge Enright was wrong in dismissing the original petition and the Missouri court of Appeals and the Missouri supreme Court were wrong in affirming that decision.

7. Respondent alleges that the Statute of Frauds bars Appellant from enforcing an oral agreement which cannot be performed within one year from the making, and cites Satterfield v. Missouri Dental Assn., 642 SW2d 110 (MO App. 1982), and International Plastics Development,Inc. v. Monsanto 433 SW2d 291 (MO Banc 1968) for this position. However, this does not apply

where Appellant detrimentally relied on the promise of Respondent. Katz v. Danny Dare, Inc., 615 SW(2) 121 (MO Appl. 1981); Leh v. Dyer, 643 SW(2) 65 (1982) and Wills v. Acron 636 SW(2) 142 (1982). Just as Mr. Katz resigned from Danny Dare, appellant resigned his position as an employee with more than ten years' services and tenure in reliance on the ACF promise of annualcontracts. Therefore, the full performance by Appellant takes the case out of the Statute of Frauds. The detrimental reliance by Appellant places him clearly within the Katz v. Danny Dare case where relief should havebeen granted to the Plaintiff on contract or quasi contract theory.

8. It therefore is requested that this Court either (1) reverse the judgment of the Missouri Court of Appeals and order that the original petition stated a cause of action and/or order that Plaintiff have

the right to file an amended complaint, and that the amended complaint states a cause of action and/or grant certiorari to enable Plaintiff and Defendants to brief and argue the sufficiency of the original complaint, and Plaintiff's right to file an amended petition and Plaintiff's right to relief under the doctrine of outrageous conduct.

Respectfully submitted,

Henry W. Cummings

Henry W. Cummings

Attorney for Plaintiff

It is certified that a copy of this petition for certiorari in the U.S. Supreme Court has been mailed this 15th day of May 1988 by Overnight Express Service to the Clerk of the U.S. Supreme Court in Washington, D.C. and by regular first class mail to Steven Hereford, Esq., 7711 Carondolet, Ste. 400, St. Louis, MO 63105, and to the Attorney General forthe State of Missouri at P.O. Box 899, Jefferson City, MO 65102, to the Clerk of the Missouri Supreme Court at P.O. Box 150 Jefferson City, MO 65102 and the Clerk of the Missouri Court of Appeals at 111 North Seventh Street, St. Louis, MO 63102.

Henry W. Cummings

Attorney at Law

State of Missouri)
) SS
County of St. Charles)

Sworn and subscribed to on this 15th day of May, 1988.

Catherine E. Cummings

CATHERINE E. CUMMINGS
NOTARY PUBLIC-STATE OF MISSOURI
ST. CHARLES COUNTY
MY COMMISSION EXPIRES JUNE 13, 1988

No. 70166

ED #53065

In the Supreme Court of Missouri

January Session 19 88

Henry W. Cummings, Plaintiff-Appellant,

vs. TRANSFER

ACF Industries, et al., Defendants-Respondents.

Now at this day, on consideration of Plaintiff-Appellant's *Application to transfer the above entitled cause from the* Eastern District *Court of Appeals, it is ordered that said application be, and the same is hereby denied*

STATE OF MISSOURI—SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January *Session thereof 19* 88 *and on the* 17th *day of* February *19* 88 *in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson City this 17th *day of* February *19*88

Thomas F. Simon

Clerk

DC

No. 70166

ED # 53065

IN THE SUPREME COURT OF MISSOURI

January Session 1988

Henry W. Cummings, Plaintiff-Appellant

vs. TRANSFER

ACF Industries, et al., Defendants-Respondents.

Now at this day, on consideration of Plaintiff-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same ishereby denied.

STATE OF MISSOURI-SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1988, and on the 17th day of February, 1988 in the above entitled cause.

Given under my hand and seal of said Court at the City of Jefferson City this 17th day of February, 1988.

(Signed) Thomas F. Simon

Clerk

D.C.

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

DIVISION FOUR

HENRY W. CUMMINGS,	)	No. 53065
	)	
Plaintiff-Appellant,	)	Appeal from
	)	the Circuit
vs.	)	Court of the
	)	County of
ACF INDUSTRIES, et al,	)	St. Louis
	)	Hon. R.T. Enright
Defendants-Respondents.	)	ORDER FILED:
		December 1, 1987

O R D E R

PER CURIAM

Plaintiff, Henry W. Cummings, appeals from the order of the trial court dismissing his petition for failure to state a claim for which relief can be granted.

The order of the trial court is affirmed. Rule 84.16(b).

IN THE
CIRCUIT COURT
COUNTY OF ST. LOUIS, MISSOURI

Henry W. Cummings	)	April 9, 1987
	)	
vs.	)	
Number 552777	)	Team B
	)	
ACF Industries, Inc. et al.	)	

Plaintiff's Motions for New Trial and to File Amended Petition, having been previously argued and submitted are denied.

CC: Henry W. Cummings, 3313 W. Adams St., St. Charles, Mo. 63301

Stephen M. Hereford, 7711 Carondelet, Suite 401, St. Louis, Mo. 63105

SO ORDERED

(Signed) R.T. Enright

Judge Division 3

IN THE

CIRCUIT COURT

COUNTY OF ST. LOUIS, MISSOURI

Henry Cummings	)	1/14 1987
	)	
vs.	)	
	)	
Number 552777	)	Team B
	)	
ACF INDUSTRIES INC.	)	
	)	
Peggy Good	)	
	)	
Gary Reger	)	
	)	
David Sutliff	)	

Defendant ACF's motion to dismiss called.

Parties appear in person and by Counsel.

Plaintiff Pro Se. Defendants motion to dismiss. Heard, argued and submitted and sustained.

Plaintiff's petition dismissed.

Costs assessed against Plaintiff.

Mann, Poger, Wittner & Hereford, PC
by Howard A. Wittner
Attorneys for Defendants
7711 Carondelet, Suite 401
St. Louis, Missouri 63105
(314) 862-3535

SO ORDERED

(Signed) R.T. ENRIGHT
Judge
Division 3

(signed) Henry W.
Cummings
Attorney for
Plaintiff
Phone 314=946-0076
763-3591

IN THE CIRCUIT COURT

FOR THE COUNTY OF ST. LOUIS

HENRY W. CUMMINGS

Plaintiff

v. CAUSE NO. 552777

ACF INDUSTRIES, INC., FILED NOV. 6, 1986

MRS. PEGGY GOOD,

JAMES C. O'HARA,

MR. GARY REGER and

DR. DAVID SUTLIFF

Defendants

PETITION - DOUBLE BREACH OF CONTRACT

I. BACKGROUND

1. Henry W. Cummings is an individual licensed to practice law in the District of Columbia and the States of Indiana, Missouri, Wyoming, and Mississippi. He resides and has a place of business at 3313 W. Adams Street, St. Charles, MO 63301.

2. Defendant ACF Industries is a New Jersey corporation having a place of business and/or may be found adjacent the

Missouri River at Main & Clark Streets in St. Charles City in St. charles County and another place of business at 3301 Rider Trail South, Earth City, Bridgeton, MO in St. Louis County. ACF Industries is in the business of manufacturing, selling, and leasing railway freight cars and railway accessory parts and supplies, hereinafter ACF. Rail cars and rail equipment are tested in the ACF facility in St. Charles.

3. Defendant David Sutliff on information and belief resides at 409 Meramec Way in St. Charles, MO in St. Charles County and is an employee of ACF Industries. He is responsible for the engineering and research and development of ACF. His duties in 1983 included the selection and administration of intellectual property matters for the engineering and research of ACF. He is sued both in his individual and in his professional capacity. On information and belief he and/or his staff have an office at the ACF facility at Main

& Clarks Streets adjacent the river in St. Charles City in St. Charles County, and at the ACF office in St. Louis County.

4. Defendant James C. O'Hara, an individual, is president of ACF and has a business address at the St. Louis County office of ACF. He is responsible for business decisions of the company including final approval of major employment staffing and hiring of major consultants. In 1983 he was vice president and general manager of ACF and had basically the same responsibilities. He is sued in his professional capacity. He has known Plaintiff Cummings since his arrival at ACF in 1972.

5. Defendant Gary Reger, an individual, is an employee of ACF and has had a business address at the St. Louis County office of ACF since sometime in 1985. On information and belief Reger is responsible for staffing key positions including hiring outside consultants at ACF, subject to

except for one lawsuit where a licensee failed to pay royalties due on a license agreement. In contrast at least one other division, the WKM Valve Division, headquartered in Houston, TX had a substantial amount of patent litigation during this same period which was expensive and time consuming to executives. Mr. Eugene Riddle was responsible for WKM division throughout this period.

10. During this period Plaintiff Cummings made patent studies concerning the Payton-Skilling Fabricated railway truck which ACF attempted to develop and made several prototypes. Plaintiff Cummings avoided infringement of outstanding railway truck patents and covered unique features of the development with U.S. Patents. Drawings submitted to ACF from Payton-Skilling contained proprietary information stamps. These drawings were treated appropriately to avoid a subsequent charge of breach of confidence based on the proprietary information stamps.

11. Another development concerned

the ACF COALVEYor coal hopper car. A detailed patent study was made to avoid infringement of a patent to Anthony Tioli of Canada. Infringement was avoided through ACF's use of a reinforced circular segment bottom. A long expired patent to Burquit was found which cast great doubt on the validity of the Tioli patent. This COALVEYOR car was commercially successful, ACF sold a number of such cars to railroad customers. On information and belief, this line of business and technology has been sold at a significant profit to ACF. Thus ACF has benefitted significantly financially from Plaintiff's legal advice concerning these cars.

12. Another development concerned the ACF Corn Syrup railway tank car for transport of corn syrup. General American Transportation Company patents directed to a similar tank car were either found to be invalid based on prior ACF constructions and/or prior patents, or were successfully avoided from the patent infringement standpoint by modifications in the coil design.

James C. O'Hara's approval. He is sued in his professional capacity. On information and belief in 1983 he was located in the ACF office at 750 3rd Avenue, N. Y., N. Y. which is now closed.

6. Defendant Peggy Good, an individual, is an employee of ACF, has a business address at ACF at the St. Louis County address. On information and belief she is presently responsible for recommending to Mr. Reger and Mr. O'Hara the staffing of positions at ACF. She is sued in her professional capacity. Defendant Good is former secretary to Defendant O'Hara and in 1983 was in the ACF Personnel Department. She has known Plaintiff Cummings since arrival at ACF in 1972.

II. FACTUAL ALLEGATIONS

7. On or about April 15, 1972 Plaintiff Henry W. Cummings joined ACF Industries as Division Patent Counsel and was responsible for the intellectual property matters associated with the Railcar Division of ACF

including the Shippers Car Line (SCL) Divisions, primarily rail car leasing and the AmCar Division involved in the manufacture and sale of rail cars including the sale of cars to SCL for leasing. In taking this position Plaintiff Cummings moved with his family from Indianapolis, IN to St. Charles, MO.

8. Prior to his joining ACF, ACF had been sued by Pullman Standard, Inc. of Chicago, Il and Gary, IN for patent infringement over a Long Travel hydraulic rail carcushioning unit. General American Transportation Co. had sued ACF over a tractor operated railway car trailer hitch.

9. During the period of April 1972 through December 1983 Plaintiff Cummings performed his duties as Division Patent Counsel for the railcar Divisions very effectively. Plaintiff Cummings was able to avoid all litigation of the Railcar Divisions in the intellectual property area

On information and belief ACF has made and is making hundreds of thousands of dollars annually on the lease of these cars. Thus ACF has greatly benefited from Plaintiff's legal advice concerning these cars.

13. Another development concerned the ACF Articulated Container Car. A detailed patent study was made of patents held by Itell Corporation on a side-bearingarrangement on an articulated car and on a brake system for an articulated car. In both cases prior art and/or prior constructions were found which rendered invalid the broad claims. A suitable non-infringing design was worked out of more limited claims through a patent study and design consultation between Plaintiff Cummings and the engineering staff. Rail road constructions including the Southern Railway were visited and inspected by Plaintiff Cummings. On information and belief ACF made large profits from the sale and/or

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lease of these cars to the Burlington Northern Railroad, the Southern Pacific Transportation Co. and others. ACF thus benefited greatly from Plaintiff Cummings' legal advice concerning these articulated cards. Unique features were covered in ACF patents prepared by Plaintiff Cummings.

14. Throughout the period of April 1972 through December 1983 Plaintiff Cummings applied for and obtained patents and trademarks on those railcar developments approved by the ACF Patent Committee. Trademarks include but are not limited to the COALVEYOR, CONDITIONAIR, and CANNONAIDE. Utility patents included baffles for the CONDITIONAIR car, blaster mounting arrangements in the CANNONAID CAR, and the design of the Model VI Trailer Hitch, as examples. Furthermore, Pullman and General American hitch patents were studied and infringement avoided in the design and development of the ACF Model VI trailer hitch.

17. Between 1980 and 1983 personnel at Bude, MI developed a technique for protecting workers in confined spaces. A search revealed a broad dominating patent held by an individual inventor. Plaintiff Cummings arranged for the purchase of the dominating patent at a very modest purchase price. A patent application was prepared and filed in the name of the Bude, MS inventors.

18. On or about June 1, 1983 Mr. George Reed, senior director of research and engineering, retired and his place was taken by Defendant David Stufliff.

19. Defendant Sutliff had worked in the ACF Engineering department during the mid 1970s. On information and belief, during the late 1970s he was associated with the American Association of rail Roads in Chicago, IL. He returned to the ACF Engineering Department in the early 1980s.

20. During the period of April 1972 through December 1983 Plaintiff Cummings reported to the patent counsel in New York

City. This position was first occupied by Mr. Wyn Lewis until approximately 1979 when his responsibilities were taken over by Mr. Eugene Riddle, former patent counsel of WKM Valve Division.

21. The patent litigation which had occurred prior to Plaintiff's arrival stopped after his arrival. All of his reviews were very satisfactory and complimentary throughout the period from April 1972 through December 31, 1983. In 1978 or there about after Plaintiff Cummings completed the COALVEYER Car study, upon the recommendation of Mr. Wyn Lewi, ACF fixed over Plaintiff Cummings' office in the St. Charles railway Test Laboratory, still located near the river at Main and Clark Streets in St. charles where on information and belief ACF still maintains a place of business and/or may be found testing railway cars and railway car parts.

22. Beginning in Fall 1981 Plaintiff Cummings began representing indigent defendants

in St. Louis City Court to gain trial experience. This continued and in 1982 was expanded to include indigent civil pro-bono litigation in a wide variety of legal areas. In addition Plaintiff Cummings audited Civil Procedure, Criminal Procedure, Evidence, and Trial Practice at Laclede School of Law at night. In 1983 Plaintiff Cummings received an award from Legal Services of Eastern Missouri for his indigent representation.

23. When Carl Ichan took over ACF in 1983 there was a need to reduce the budget and it was determined by Ichan management that a full time intellectual property attorney was not requiredfor the Railcar Divisions. Discussions ensued between Plaintiff Cummings and corporate patent counsel, Eugene Riddle, concerning Cummings' entry into private practice. Plaintiff Cummings recognized that he had a vested retirement at ACF and that it was a significant step to enter private practice. At the same time it was

felt that this would be advantageous to ACF because of the reduced budget for intellectual property work. The added skills which Plaintiff Cummings had acquired through representation of indigents in trial work would also be available to ACF on a modest fee basis.

24. Specific individuals at ACF were consulted including but not limited to Mr. Walter O'Leary of Shippers Car Line. Plaintiff Cummings received assurances that so long as there was legal work to be done in the intellectual property area in the Railcar Divisions that such intellectual property work would be given to Plaintiff Cummings because of his successful prior record.

25. Plaintiff Cummings was to submit monthly statements to Defendant Sutliff, through Mr. Joe Muller of Carter Carburetor who was also made administratively responsible for the intellectual

property matters of the Railcar Divisions. It was understood that Plaintiff Cummings would come into the Railcar Division office and consult with Railcar personnel as necessary to do the necessary tasks concerning preparation of patent applications or patent studies necessary to complete intellectual property investigations, patent filings, and trademark filings. Plaintiff Cummings was to be paid an hourly rate for this work.

26. This arrangement was to continue indefinitely and Plaintiff Cummings was to have a series of annual contracts. Plaintiff Cummings was entitled to have other clients, but it was understood that ACF would be his primary client and that he would not take on other clients of such a nature as to render his services to ACF ineffective. The first of these annual contracts was given to Plaintiff Cummings (Exh.1) in October of 1983 for the Calendar year

1984. Plaintiff Cummings carried out this contract in 1984 through the first three weeks of August and Plaintiff's wife functioned as secretary part of the time at no charge to ACF. This arrangement worked very successfully and enabled Plaintifff Cummings to try and win a patent infringement case in Casper, WY. The trial court holding that the patent was valid and infringed was affirmed by the Court of Appeals for the Federal Circuit.

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Cummings and his family then proceeded to Augusta, GA in an effort to inspect a General American Transportation Co. tank car having an outlet valve which it was believed would invalidate a competitor's patent.

28. While enroute to Augusta the railway car was moved from Augusta to Savannah. Plaintiff Cummings and his wife directed their trip to Savannah and found the car in the railroad yard. Before obtaining permission from the railroad, photographs of the outlet valve were taken to insure that the information concerning the construction of the outlet valve would be available to ACF. This was a very dangerous undertaking since the car could have been moved at any time. Subsequently, permission was obtained to take additional photographs, and they were taken AFTER THE CAR WAS MOVED the next day. However, this incident indicates the devotion to ACF

which Plaintiff Cummings had at the time. Plaintiff Cummings and his family returned to ACF at St. Charles around August 1, 1984.

29. However, on or about August 27, 1984 Defendant Sutliff advised Plaintiff Cummings and his wife, who was functioning as his secretary at that time, that the contract work for 1984 was completed as of the close of business of this date. (Exb.2) No addditional notice was given. Reluctantly Plaintiff Cummings and his wife left ACF that day.

30. Defendant Sutliff orally advised that the work had been transferred to Polster, Polster and Lucchesi, a local patent law firm. On information and belief Defendant Sutliff acted without obtaining proper ACF approval and authority and acted arbitrarily and capriciously without giving due consideration to Plaintiff Cummings' prior excellent record of service for 13 years, in comparision to the litigation which had occurred before Plaintiff arrived. In

selecting Polster, Polster, and Lucchesi to do intellectual property work for the Railcar Divisions beginning in September 1984 Defendant Sutliff and ACF clearly breached Plaintiff Cummings' contract and understanding with ACF which had led Plaintiff Cummings to enter private practice from the employee status.

31. Polster, Polster, and Lucchesi had no prior intellectual property experience with the ACF Railcar Divisions in contrast to Plaintiff Cummings' thirteen years experience in this area.

32. After several weeks Plaintiff Cummings contacted Defendant Sutliff and requested to complete the work he had begun prior to being asked to leave. Defendant Sutliff denied this over the phone without prior consultation. This consistutues a further arbitrary and cappricious breach which was clearly not in the best interest of ACF.

33. In January 1985 Plaintiff Cummings wrote to Defendant Sutliff and pointed out that the trial of the patent infringement suit in Wyoming had been successful from the Plaintiff's view and that other smaller trial matters had been successfully completed in the St. Louis area. Plaintiff Cummings received no response from Defendant Sutliff.

34. During late 1984 and in early 1985 Plaintiff Cummings concentrated on increasing legal business in Missouri, Wyoming, and Mississippi. In so doing a large credit card balance developed for trips and other expenses. Plaintiff Cummings and his wife have had to take out a $17,000 loan with the Mercantile Bank of St. Charles because of the failure of ACF to keep its commitments to Plaintiff Cummings in Calendar 1985, when hourly payments from ACF had been planned on, and no hourly payments were received.

35. In order to support his family in July of 1985 Plaintiff Cummings took

a position as patent attorney for the U.S. Army in St. Louis. This position involves evaluating property legends on drawings submitted to the U.S. Government and some patent evaluations. This work is much less challenging and more repetitive than the private practice position. Also, the stature of this legal position is reduced. Final responsibility for much of this work lies in the Army Material Command Legal Office in Washington, D.C. The government has conflict of interest regulations which are burdensome and unrealistic. Memos and letters must be drafted by handwriting or typing which is time consuming and inefficient.

36. On or about November 11 of 1985 Plaintiff Cummings contacted Personnel Representative and Defendant Mrs. Peggy Good, former secretary to Defendant O'Hara, over the telephone and advised her of his desire to return to ACF. Plaintiff Cummings

Plaintiff was advised that ACF had hired Joe Muller as corporate attorney.

39. The hiring of Joe Muller as full-time staff attorney without interviewing or meaningfully reconsidering Plaintiff Cummings constitutes a breach of the contract entered into between Plaintiff Cummings and ACF acting through Mrs. Good in November, 1985. Mrs. Good, Mr. Reger, Mr. O'Hara, and ACF breached this contract in failing to inform and meaningfully consider Plaintiff Cummings for the staff attorney position.

40. Joe Muller was patent counsel for Carter Carburetor owned by ACF until on information and belief late 1985 or early 1986 when it was sold to Federal Mogul. Mr. Muller has limited experience in the railway industry. He is considerably younger than Plaintiff Cummings. Employment of Muller thus consitutues age discrimination against Plaintiff Cummings under 29 USC 626 et al.

41. On information and belief Muller has been promoted to General Counsel without interviewing or meaningfully considering Plaintiff Cummings for the position. This constitutes a further breach of the agreement reached between Plaintiff Cummings and Defendant Good.

42. On information and belief Defendant Good failed to effectively apprise Defendant Reger, a new employee, of Plaintiff Cummings' prior contribution to ACF, his trial experience, and the legal courses he audited in the evenings so that Defendant Reger could accurately appraise Plaintiff Cummings for the staff or general counsel position. She knew or should have know of Cummings' prior contributions and his legal potential because of his law school record and indigent representation.

43. On information and belief Defendant O'Hara failed to effectively supervise

and question Defendant Reger in accepting his recommendation to hire Joe Muller, and on information and belief to promote him to general counsel. O'Hara knew or should have known of Plaintiff's prior contributions and the efforts he made to prepare himself for general legal representation including auditing night courses and engaging in indigent representation.

III RELIEF REQUESTED

It is requested that this Court hold and order that:

1. That ACF Industries has breached its contract with Plaintiff Cummings entered into in October 1983 for annual intellectual property law contracts for the Railcar Divisions of ACF.

2. That ACF Industries pay to Plaintiff Cummings the minimum rate of $2,500 per month for the balance of calendar 1984 or $10,000 and forthe first half of Calendar 1985 $17,500 or $27,500 until

Plaintiff Cummings took the position with the United States Government with interest not less than 10% per annum.

3. Assess additional damages of 100% for pain, suffering, and worry of $27,500for the period September 1984 to July 1985.

4. That ACF Industries offer to Plaintiff Cummings:

a. the consulting arrangement previously agreedupon wherein Plaintiff Cummings would do the intellectual property work for the Railcar Divisions at an hourly rate to be negotiated not less than $50 per hour, with a written understanding that it is to last until Plaintiff Cummings reaches age 70, if he so desires, or

b, at Plaintiff Cummings' option an employee arrangement in a legal position as an employee at an amount to be negotiated not less than $75,000 per year with less

experienced attorney Joe Muller reporting to Plaintiff Cummings.

5. That a preliminary injunction issue against the future use of the legal services of Joe Muller during the pendancy of this litigation unless and until option 3(a) or 3(b) is in operation for the benefit of Plaintiff Cummings.

6. And that a permanent injunction issue at the end of this litigation that the legal services of Joe Muller not be used except and unless Plaintiff Cummings is acting as an employee per 3(b) or consultant per 3(a).

7. That this Copurt order punitive damages against ACF Industries and/or Defendant Sutliff because:

1) Defendant Sutliff acted arbitrarily and capriciously and without authority in breaching the contract with Plaintiff Cummings in hiring Polster, Polster, and Lucchesi to do the intellectual property

work which Plaintiff Cummings had so successfully done in prior years, and in not allowing Plaintiff Cummings to complete the work he had started in 1984, and that the $27,500 damages plus 100% or $55,000 be trebled to $165,000 at least against Defendants Sutliff and ACF because of this arbitrary, capricious, and bad faith contract breach.

2) Order additional damges of $75,000 per year because of the hiring of less qualified Joe Muller to the position of staff attorney, and on information and belief his promotion to general counsel because this constitutes age discrimination, and that these damages be assessed jointly or severally against Defendants Good, Reger, and O'Hara for twenty years or $1,500,000 plus 10% interest.

8. And such further and additional relief as this Court deems just and equitable.

9. A jury trial is requested.

Respectfully submitted,

Henry W. Cummings
Attorney for Plaintiff
3313 W.Adams
St. Charles, MO 63301
(314) 946-0076

IN THE CIRCUIT COURT

FOR THE COUNTY OF ST. LOUIS

HENRY W. CUMMINGS Plaintiff v. ACF Industries, Inc. MRS PEGGY GOOD 520 Ken Dr., St. Charles, MO JAMES C. O'HARA 9889 Cooper, St. Louis, MO MR. GARY REGER 11 Spring Lake Ct., St. Peters, MO Dr, DAVID SUTLIFF 409 Meramac Way, St. Charles, MO Defendants	)	CAUSE NO. 552,777 FILED JAN. 28, 1987

FIRST AMENDED PETITION - DOUBLE BREACH OF CONTRACT

I BACKGROUND

1. Henry W. Cummings is an individual licensed to practice law in the District of Columbia and the States of Indiana, Missouri, Wyoming, and Mississippi. He resides and has a place of business at 3313 W. Adams Street, St. Charles, MO 63301.

2. Defendant ACF Industries is a New Jersey corporation having a place of business and/or may be found adjacent the Missouri

River at Main & Clark Streets in St. Charles City in St. Charles County and another place of business at 3301 Rider Trail South, Earth City, Bridgeton, MO in St. Louis County. ACF Industries is in the business of manufacturing, selling, and leasing railway freight cars and railway accessory parts and supplies, hereinafter ACF. Rail cars and rail car equipment are tested in the ACF facility in St. Charles.

3. Defendant David Sutliff on information and belief resides at 409 Meramac Way in St. Charles, MO in St. Charles County and is an employee of ACF Industries. He is responsible for the engineering and research and development of ACF. His duties in 1983 included the selection and administation of intellectual property matters for the engineering and research of ACF. He is sued both in his individual and in his professional capacity. On information and belief he and/or his staff have an

office at the ACF facility at Main and Clark Streets adjacent the river in St. Charles City in St. Charles County, and at the ACF office in St. Louis County.

4. Defendant James C. O'Hara, an individual, is president of ACF and resides at 9889 Cooper, St. Louis, MO. He has a business address at the St. Louis County office of ACF. He is responsible for business decisions of the company including final approval of major employment staffing and the hiring of major consultants. In 1983 he was vice president and general manager of ACF and had basically the same responsibilities. He is sued in his professional capacity. He has known Plaintiff Cummings since his arrival at ACF in 1972.

5. Defendant Gary Reger, an individual, is an employee of ACF and has a residence at 11 Spring Lake Court, St. Peters, MO. He had a business address at the St. Louis County office of ACF since sometime in

1985. On information and belief Reger is responsible for staffing key positions including hiring outside consultants at ACF, subject to James C. O'Hara's approval. He is sued in his professional capacity. On information and belief in 1983 he was located in the ACF office at 750 3rd Avenue, N.Y., N.Y. which is now closed.

6. Defendant Peggy Good, an individual, is an employee of ACF, has a residence at 520 Ken Drive, St. Charles, MO and a business address at ACF at the St. Louis County address. On information and belief she is presently responsible for recommending to Mr. Reger and Mr. O'Hara the staffing of positions at ACF. She is sued in her professional capacity. Defendant Good is former secretary to Defendant O'Hara and in 1983 was in the ACF Personnel Department. She has known Plaintiff Cummings since his arrival at ACF in 1972.

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and in 1983 wasin the ACF Personnel Department. She has known Plaintiff Cummings since his arrival at ACF in 1972.

II COUNT I - Breach of Contract to Do Intellectual Property Work

FACTUAL ALLEGATIONS

7. On or about April 15, 1972 Plaintiff Henry W. Cummings joined ACF Industries as Division Patent Counsel and was responsible for the intellectual property matters associated with the Railcar Divisions of ACF including the Shippers Car Line (SCL) Division, primarily rail car leasing and the AmCar Division involved in the manufacture and sale of rail cars including the sale of cars to SCL for leasing. In taking this position Plaintiff Cummings moved with his family from Indianapolis, In to St. Charles, MO.

8. Prior to his joining ACF, ACF had been sued by Pullman Stanard, Inc. of Chicago, IL and Gary, IN for patent infringement over a Long Travel hydraulic

advised her he wished to be considered for any additional legal positions at ACF. She agreed to this proposal and advised him that this was noted.

37. In January 1986 the undersigned contacted the office of ACF Industries and met with Mr. Bob Allen, an attorney responsible for personnel matters at the Earth City facility. Plaintiff requested employment or a return to the contractual arrangement utilized in 1984. Mr. Allen again advised that ACF Industries was unwilling to complete its contractual obligation to Plaintiff Cummings, and that no legal positions were currently available at ACF.

38. In early July of 1986 Plaintiff Cummings wrote to Mr. James C. O'Hara, Defendant herein, who had been made president of ACF by the Icahn people and requested that he be given private practice assignments or be re-employed as an attorney.

rail car cushioning unit. General American Transpsoration Co. had sued ACF over a tractor operated railway car trailer hitch.

9. During the period of April 1972 through December 1983 Plaintiff Cummings performed his duties as Division Patent Counsel for the railcar Divisions very effectively. Plaintiff Cummings was able to avoid all litigation of the Railcar Divisions in the intellectual property area except for one lawsuit where a licensee failed to pay royalties due on a license agreement. In contrast at least one other division, the WKM Valve Division, head- quartered in Houston, TX had a substantial amount of patent litigation during this same period which was expensive and time consuming to executives. Mr. Eugene Riddle was responsible for WKM division throught this period.

10. During this period Plaintiff Cummings made patent studies concerning the Payton-Skilling Fabricated railway truck which ACF attempted to develop and

made several prototypes. Plaintiff Cummings avoided infringement of outstanding railway truck patents and covered unique features of the development with U.S. Patents. Drawings submitted to ACF from Payton-Skilling contained proprietary information stamps. These drawings were treated appropriately to avoid a subsequent charge of breach of confidence based on the proprietary information stamps.

11. Another development concerned the ACF COALVEYER coal hopper car. A detailed patent study was made to avoid infringement of a patent to Anthony Tioli of Canada. Infringement was avoided through ACF's use of a reinforced, circular segment bottom. A long expired patent to Burquist was found which cast great doubt on the validity of the Tioli patent. This COALVEYER car was commercially successful, ACF sold a number of such cars to railroad customers. On information and belief, this line of business and technology has

been sold at a significant profit to ACF. Thus ACF has benefited significantly financially from Plaintiff's legal advice concerning these cars.

12. Another development concerned the ACF Corn Syrup Railway tank car for transport of corn syrup. General American Transportation Company patents directed to a similar tank car were either found to be invalid based on prior ACF constructions and/or prior patents, or were successfully avoided from the patent infringement standpoint by modifications in the coil design. On information and belief ACF has made and is making hundreds of thousands of dollars annually on the lease of these cars. Thus ACF has greatly benefitted from Plaintiff's legal advice concerning these cars.

13. Another development concerned the ACF Articulated Container Car. A detailed patent study was made of patents held by Itell Corporation on a side-bearing arrangement on an articulated car and on

a brake system for an articulated car. In both cases prior art and/or prior constructions were found which rendered invalid the broad claims. A suitable non-infringing design was worked out of more limited claims through a patent study and design consultation between Plaintiff Cummings and the engineering staff. Railroad constructions including the Southern Railway were visted and inspected by Plaintiff Cummings. On information and belief ACF made large profits from the sale and/or lease of these cars to the Burlington Northern Railroad, the Southern Pacific Transportation Co. and others. ACF thus benefited greatly from Plaintiff Cummings' legal advice concerning these articulated cars. Unique features were covered in ACF patents prepared by Plaintiff Cummings.

14. Throughout the period of April 1972 through the summer of 1983 Plaintiff Cummings applied for and obtained patents and trademarks on those railcar developments

approved by the ACF Patent Committee. Trademarks included but are not limited to the COALVEYOR and CANNONAIDE. Utility patents included baffles for the CONDITIONAIR car, blaster mounting arrangements in the CANNONAID CAR, and the design of the Model VI Trailer Hitch, as examples.

15. Pullman and General American hitch patents were studied and infringement avoided in the design and development of the ACF Model VI trailer hitch, which on information and belief has been sold through WKM Valve Div. to Joy Mfg. Co. of Pittsburgh, PA.

16. On or about 1976 Plaintiff Cummings obtained a patent for inventors, Rollins and Walk, on a combination hatch cover for use in the roofs of railway hopper cars. ACF benefited significantly by this relatively simple hatch cover arrangement for the transport of dust type ladings such as flour and sugar. The Union Pacific and other railroads placed orders for cars having such combination covers. On information

and belief Pullman Standard stopped offering these cars after Plaintiff Cummings obtained this combination cover patent for ACF.

17. In 1980, on the recommendation of Plaintiff Cummings Dallas Rollins, then Manager of Research & Development at ACF, was made Missouri inventor ofthe year. Rollins had obtained many patents for ACF on a wide variety of commercially successful rail car concepts. A reception was held at the Bar Association of Metropolitan St. Louis to honor this occasion.

18. Between 1980 and 1983 personnel at Bude, MS developed a technique for protecting workers in confined spaces. A search revealed a broad dominating patent held by an individual inventor. Plaintiff Cummings arranged for the purchase of the dominating patent at a very modest purchase price. A patent application was prepared and filed in the name of the Bude, MS inventors.

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22. Beginning in Fall 1981 Plaintiff Cummings began representing indigent defendants in St. Louis City Court to gain trial experience. This continued and in 1982 was expanded to include indigent civil pro-bono litigation in a wide variety of legal areas. In addition Plaintiff Cummings audited Civil Procedure , Criminal Procedure, Evidence, and Trial Practice at Laclede School of Law at night. In 1983 Plaintiff

24. The negotiations concerning this matter were extensive. Reference is made to attached Exhibit 2, a memorandum from Plaintiff to Mr. Riddle dated September 22, 1983 typed by Lynn Grade who was Plaintiff's secretary at that time and whose initials appear as "lg", subject of "Reconsideration of Entry into Private Practice." In the memorandum in the 1st paragraph of the first page Plaintiff indicated that he felt that a period of about five years was necessary before a move into private practice was justified for him to make.

25. On the second page Plaintiff advised Mr. Riddle that he was suspending negotiations concerning entry into private practice because of the uncertain takeover situation. In thethird paragraph he again stressed a need for a period of at least five years.

26. Plaintiff Cummings distinctly recalls upon reviewing this memorandum asking Mrs. Grade to transmit this memorandum over the Telecopier to Mr. Riddle at the

Cummings received an award from Legal Services of Eastern Missouri for his indigent representation.

23. When Carl Ichan took over ACF in 1983 there was a need to reduce the budget and it was determined by Ichan management that a full time intellectual property attorney was not required for the Railcar Divisions. Discussions ensued between Plaintiff Cummings and corporate patent counsel, Eugene Riddle, concerning Cummings' entry into private practice. Plaintiff Cummings recognized that he had tenure and a vested retirement at ACF and that it was a significant step to enter private practice. At the same time it was felt that this would be advantageous to ACF because of the reduced budget for intellectual property work. The added skills which Plaintiff Cummings had acquired through representation of indigents in trial work would also be available to ACF on a modest fee basis.

New York Office at 750 3rd Avenue, N.Y., N.Y., and to distribute copies to the individuals whose names appear at the top of the first page of the document, opposite to "ACF Industries" which appears in the upper right hand corner.

27. Oral discussions continued between Plaintiff and primarily Mr. Riddle concerning possible entry into private practice. Exhibit 3 is a copy of a letter which was prepared by my wife, Catherine Cummings, and which was sent to Mr. riddle on or about October 24, 1983 entitled "Contract for Private Practice Calendar 1984." In the third paragraph of this letter reference is made to the fact that the Rail Car Division management had not approved the agreement for Plaintiff's entry into private practice and had sent it back for further consideration.

28. Furthermore, in the fifth paragraph there is reference to the fact that both

Joe Corr, currently president of TWA, and Jim O'Hara, presently president of ACF, had reticience about the agreement.

29. In the last paragraph on the first page of this document there is a statement that "a three to five year agreement would be more appropriate" and that a one year agreement would not provide sufficient security or protection for my wife and family. In the third paragraph of page 2, Plaintiff Cummings stressed the importance of a need to reconsider the private practice arrangement at this time. Mrs. Grade was also instructed to send this memo to Mr. Riddle on the Telecopier and to distribute copies to the recipients listed at the bottom of page 2.

30. Following Plaintiff Cummings' sending this letter to Mr. Riddle, Mr. Riddle telephoned Plaintiff and advised him that he would be given annual contracts to do the Rail Car work indefinitely because

his record of avoiding litigation was considered to be so strong that such a long term on-going relationship was justified in view of the substantial ACF infringement exposure which was present at this time. Mr. Riddle further indicated that Joe Moeller was to remain associated with Carter Carburetor. He had experience with the carburetors and fuel pumps which Carter made and the additional products they were attempting to develop. Mr. Riddle advised that Moeller lacked the background, experience and first hand knowledge necessary to carry ACF through anypatent litigation which might result from the substantial infringement exposure which ACF had at this time concerning the ACF CORN SYRUP car relative to General American patents and the ACF ARTICULATED CONTAINER cars relative to the Itell patents on the brake system and on the side bearing arrangement.

31. Specific individuals at ACF were consulted including but not limited to

Mr. Walter O'Leary of Shippers Car Line. Plaintiff Cummings received assurances that so long as there was legal work to be done in the intellectual property area in the Railcar Divisions that such intellectual property work would be given to Plaintiff Cummings because of his successful prior record.

32. Upon receiving this assurance Plaintiff Cummings decided it was appropriate to trust ACF and execute the standard agreement with the assurances that he would receive additional similar contracts on an annual basis.

33. Plaintiff Cummings was to submit monthly statements to Defendant Sutliff, through Mr. Joe Moeller of Carter Carburetor who was also made administratively responsible for the intellectual property matters of the Railcar Divisions. It was understood that Plaintiff Cummings would come into the Railcar Division office and consult with Railcar personnel as necessary to do the necessary tasks concerning preparation

of patent applications or patent studies necessary to complete intellectual property investigations, patent filings, and trademark filings. Plaintiff Cummings was to be paid an hourly rate for this work. This arrangement was tocontinue indefinitely and Plaintiff Cummings was to have a series of annual contracts. Plaintiff Cummings was entitled to have other clients, but it was understood that ACF would be his primary client and that he would not take on other clients of such a nature as to render his services to ACF ineffective.

34. The first of these annual contracts was given to Plaintiff Cummings in October of 1983 for the Calendar year 1984 (Exh. 1). Plaintiff Cummings carried out this contract in 1984 through the first three weeks of August and Plaintiff's wife functioned as secretary part of the time at no charge to ACF. This arrangement worked very successfully and enabled Plaintiff Cummings to try and win a patent

infringement case in Casper, WY. The trial court holding that the patent was valid and infringed was affirmed by the Court of Appeals for the Federal Circuit.

35. On or about July 15, 1983, Mr. Riddle advised the Plaintiff that he did not have to have further concern about being limited to the minimum amoung specified in the consulting agreement for 1984. He indicated to Plaintiff that he could bill ACF for whateverwas necessary to get the intellectual property work done indefinitely. Mr. Riddle made no mention of a three (3) to five (5) year limitation and gave Plaintiff an assurance that the ACF intellectual property work was his because ofhis prior successful record and local St. Louis location for access to ACF personnel.

36. After receiving this assurance in July of 1984 Plaintiff Cummings and his wife onbehalf of ACF went on a trip to the South. The first stop was in Jackson, MS where Plaintiff Cummings was

sworn in to practice law in Mississippi not far from the Shippers Car Line, Bude, MS plant which Plaintiff Cummings had previously visited on intellectual property business. It was felt Shippers Car line could use Plaintiff Cummings on other legal business in Mississippi. Plaintiff Cummings and his family then proceeded to Augusta, GA in an effort to inspect the General American Transportation Co. tank car having an outlet valve which it was believed would invalidate a competitor's patent.

37. While enroute to Augusta the railway car was moved from Augusta to Savannah. Plaintiff Cummings and his wife directed their trip to Savannah and found the car in the railroad yard. Before obtaining permission from the railroad, photographs of the outlet valve were taken to insure that the information concerning the construction of the outlet valve would be available to ACF. This was a very dangerous undertaking since the car could have been moved at any time. Subsequently, permission

was obtained to take additional photographs, and they were taken AFTER THE CAR WAS MOVED the next day. However, this incident indicates the devotion to ACF which Plaintiff Cummings had at the time. Plaintiff Cummings and his family returned to ACF at St. Charles around August 1, 1984.

38. Plaintiff would not have gone on the extensive trip identified in paragraphs 36 and 37 above if he did not feel confident that he had established a long term relationship with ACF. Plaintiff would not have done this, if he didn't think he had a lifetime commitment and agreement with ACF Industries.

39. Therefore, Plaintiff was surprised and shocked to receive the August 27, 1984 memorandum by Dr. Sutliff entitled "Consulting Agreement", Petition Exhibit 4, wherein Dr. Sutliff stated that his services and his wife's (who was functioning as his secretary at that time) were no longer required. This clearly constituted

a fundamental breach of the agreement reached the previous Autumn in 1983 with ACF and reaffirmed by Mr. Riddle the previous month, as described above in paragraph 35. The contract work for 1984 was completed as of the close of business of this date. No additional notice was given. Reluctantly Plaintiff Cummings and his wife left ACF that day.

40. Defendant Sutliff orally advised that the work had been transferred to Polster, Polster, and Lucchesi, a local patent law firm. On information and belief Defendant Sutliff acted without obtaining proper ACF approval and authority, and acted arbitrarily and capriciously without giving due consideration to Plaintiff Cummings' prior excellent record of service for 13 years, in comparison to the litigation which had occurred before Plaintiff arrived. In selecting Polster, Polster, and Lucchesi to do the intellectual property work for

the Railcar Divisions beginning in September 1984 Defendant Sutliff and ACF clearly breached Plaintiff Cummings' contract and understanding with ACF which had led Plaintiff Cummings to enter private practice from the employee status.

41. Defendants Sutliff and ACF had a contractual duty to Plaintiff Cummings, Defendants ACF and Sutliff failed to consider Plaintiff's prior record at ACF, his law school record including law review and indigent representation record. Polster, Polster and Lucchesi had no prior intellectual property experience with the ACF Railcar Divisions in contrast to Plaintiff Cummings' Thirteen years experience in this work. This negligence was the proximate cause of injury to Plaintiff Cummings including, but not limited to, lost income, lost stature in the legal community and lost opportunity to remain in private practice.

42. After several weeks Plaintiff Cummings contacted Defendant Sutliff by telephone and requested to complete the work he had begun prior to being asked to leave. Defendant Sutliff denied this over the phone without prior consultation. This consitutues a further arbitrary and capricious breach which was clearly not in the best interest of ACF.

43. In January 1985 Plaintiff Cummings wrote to Defendant Sutliff (Exh. 5) and pointed out that the trial of the patent infringement suit in Wyoming had been successful from the Plaintiff's view and that other smaller trial matters had been successfully completed in the St. Louis area. Plaintiff Cummings received no response from Defendant Sutliff.

44. During late 1984 and in early 1985 Plaintiff Cummings concentrated on increasing legal business in Missouri, Wyoming, and Mississippi. In so doing

a large credit card balance developed for trips and other expenses. Plaintiff Cummings and his wife have had to take out a $17,000 loan with the Mercantile Bank of St. Charles because of the failure of ACF to keep its commitments to Plaintiff Cummings in Calendar 1985, when hourly payments from ACF had been planned on, and no hourly payments were received.

45. In order to support his family in July of 1985 Plaintiff Cummings took a position as patent attorney for the U.S. Army in St. Louis. This position involves evaluating property legends on drawings submitted to the U.S. Government and some patent evaluations. This work is much less challenging and more repetitive than the private practice position. Also, the stature of this legal position is reduced. Final responsibility for much of this work lies in the Army Material Command Legal Office in Washington, D.C. The government

has conflict of interest regulations which are burdensome and unrealtistic. Memos and letters must be drafted by handwriting or typing which is time consuming and inefficient.

III COUNT II Breach of Oral Contract to Consider Plaintiff for Future Legal Positions at ACF

46. Plaintiff hereby realleges the facts pleaded in paragraphs 1-45.

47. In Autumn of 1985, believed to be on or about November 11 of 1985, Plaintiff Cummings telephoned ACF Personnel Representative and Defendant Mrs. Peggy Good, former secretary to Defendant O'Hara, over the telephone and advised her of his desire to return to ACF. Plaintiff Cummings advised her he wished to be considered for any additional legal positions at ACF. She agreed to this proposal and advised him that this was noted in Plaintiff Cummings' file. She indicated that there were no legal openings presently available for

ACF, but that she would bear in mind his interest in returning to ACF.

48. There was consideration to ACF to reemploy an attorney who had successfully represented the Rail Car Divisions in intellectual property law for 13 years, had a proven aptitude for law, as evidenced by his making law review in evening school, and had acquired more skills since leaving ACF. There was consideration to Plaintiff Cummings to return to ACF and utilize his railroad experience and other knowledge in a manner which had proven meaningful to him for a number of years, and regain his seniority. Plaintiff relied on this and did not seek other positions outside the St. Louis area until advised by Defendant O'Hara in 1986 that Mr. Joe Moeller had been hired as Staff Attorney.

49. It is to be noted that Plaintiff Cummings has known Mrs. Good for a long period of time. Plaintiff Cummings had played the piano at retirement parties

planned by Mrs. Good as ACF personnel representative. Frequently Mrs. Good would request Plaintiff Cummings to arrange for the band members at the retirement parties. Plaintiff Cummings believed that he had established a relationship of trust and confidence with Mrs. Good. He did not feel that it was necessary when Defendant Good was involved to send a confirming letter.

50. In January 1986 the undersigned contacted the office of ACF Industries and met with Bob Allen, an attorney responsible for personnel matters at the Earth City facility. Plaintiff requested employment or a return to the contractual arrangement utilized in 1984. Mr. Allen again advised that ACF Industries was unwilling to complete its contractual obligation to Plaintiff Cummings, and that no legal positions were currently available at ACF.

51. In early July of 1986 Plaintiff Cummings wrote to Mr. James C. O'Hara,

Defendant herein, who had been made president of ACF by the Icahn people and requested that he be given private practice assignments or be reemployed as an attorney. Mr. O'Hara advised that ACF had hired Joe Moeller as corporate attorney (Exh. 6).

52. In breach of this agreement with ACF and Mrs. Good Plaintiff Cummings was not advised of the availability of the position of staff attorney. Plaintiff Cummings was not interviewed for the position of staff attorney. Plaintiff Cummings did not know that the position existed. Plaintiff Cummings learned of this in a letter from Defendant James O'Hara when he returned to ACF as president, and that this position was given to Joe Moeller.

53. If Plaintiff Cummings had been aware that there was a position available as staff attorney at ACF, he would have filled out an application and requested an interview. Plaintiff Cummings has more legal aptitude, more general experience

and far more rail car experience than does Joe Moeller whose experience is primarily with Carter Carburetor relating to carburetors and fuel pumps. These are much smaller mecahnical devices and structually much different than the rail cars manufactured and leased by ACF Industries.

54. Specifically, Plaintiff Cummings made the Law Review while working at the U.S. Patent Office and going to night law school at Catholic University in Washington D.C. On information and belief Joe Moeller went to day school here in St. Louis, did not make the Law Review, and has no experience at the U.S. Patent and Trademark Office. Joe Moeller was patent counsel for Carter Carburetor owned by ACF until on information and belief late 1985 or early 1986 when it was sold to Federal Mogul. Mr. Moeller has limited experience in the railway industry. He is considerably younger than Plaintiff Cummings. Employment of Moeller thus constitutues age

discrimination against Plaintiff Cummings under 29 USC 626 et al.

55. Thus, the hiring of Joe Moeller as full time staff attorney without interviewing or meaningfully reconsidering Plaintiff Cummings constitutes a first breach of the contract entered into between Plaintiff Cummings and ACF acting through Mrs. Good in November 1985. Mrs. Good, Mr. Reger, Mr. O'Hara, and ACF breached this contract in failing to inform, and meaningfully consider Plaintiff Cummings for the staff attorney position.

56. On information and belief Moeller has been promoted to General Counsel (Exb. 7) without interviewing or meaningfully considering Plaintiff Cummings for the position. This constitutes a second breach of the agreement reached between Plaintiff Cummings and Defendant Good. The promotion of Moeller to general counsel which is evidenced by Moeller's letter to Plaintiff

asked the landlord to answer his Petition for Certiorari on the issue of mootness concerning preventing the landlord from filing new eviction notices. This and a number of other State and Federal proceedings have given Plaintiff a far better litigation background than Joe Moeller.

58. Plaintiff Cummings has been damaged siginificantly by this breach in failing to select Plaintiff as General Counsel. Plaintiff Cummings has used a figure of $75,000 a year or over twenty years of $1,500,000 of lost income to Plaintiff Cummings. However, maintaining Joe Moeller as general counsel and not effectively utilizing the proven record and legal skills of Plaintiff Cummings could well cost ACF a great deal more over this twenty year period.

59. Finally, since ACF and Dr. Sutliff appointed Polster, Polster and Lucchesi to do the intellectual property work,

Plaintiff Cummings has suffered outrageous conduct which caused emotional distress because of his rejection by ACF Industries. He has attended counseling sessions on a regular basis with Dr. Allan Zacker who is an attorney, psychologist and an Episcopal priest. It is believed that all of the costs and expenses which Plaintiff Cummings has incurred utilizing the services of Dr. Zacker are damages which Plaintiff Cummings should recover from ACF Industries.

V REQUESTED CONCLUSIONS OF LAW

It is requested that this Court hold and order that:

1. That ACF Industries has breached its contract with Plaintiff Cummings entered into in October 1983 to provide Plaintiff with annual intellectual property law contracts for the Railcar Divisions of ACF.

2. Defendant Sutliff acted arbitrarily and capriciously and without authority in breaching the contract with Plaintiff Cummings in hiring Polster, Polster, and Lucchesi to do the intellectual property work which Plaintiff Cummings had so successfully done in prior years, and in not allowing Plaintiff Cummings to complete the work he had started in 1984.

3. That ACF Industries and Defendant Sutliff's professional breach August 1984 in failing to renew Plaintiff Cummings' contract and grant Plaintiff Cummings annual contracts, was the cause of injury to

Plaintiff Cummings in terms of lost income, lost stature in the legal community and lost opportunity to remain in private practice.

4. Hold that ACF and Defendants Good, Reger, and O'Hara breached its contract with Plaintiff Cummings to consider Plaintiff forthe position of Staff Attorney.

5. Hold that ACF breached its contract by hiring Joe Moeller for the position of General Counsel instead of Plaintiff Cummings, and that this breach was the proximate or at least a contributing cause to the injury to Plaintiff Cummings, and that these damages be assessed jointly or severally against Defendants Good, Reger, and O'Hara.

RELIEF REQUESTED

1. ACF Industries pay to Plaintiff Cummings the minimum rate of $2,500 per month for the balance of Calendar 1984 or $10,000 and for the first half of Calendar 1985 $17,500 or $27,500 until

o be a more significant breach than the
lacement of Moeller as staff attorney
ith ACF.

57. In letters written to ACF Plain-
iff Cummings had pointed out his success
n a patent infringement suit in Wyoming
n which Plaintiff Cummings took all the
iscovery and shared the trial responsi-
ility with the attorney who obtained the
atent, Mr. Arthur Zoble of Ft. Worth,
X. Plaintiff Cummings had further instituted
landlord tenant case in Federal Court
n which after the complaint and a motion
as filed the other side dismissed the
tate Court eviction procedure. And Plain-
iff was successful in the Eigth Circuit
ourt of Appeals in which the dismissal
f the complaint was overturned because
he issue of damages was not considered
y the Trial Court. Plaintiff Cummings
lso pointed out that the Supreme Court

Plaintiff Cummings took the position with the United States Government with interest not less than 10% per annum.

2. Assess additional damages of 100% for pain, suffering and worry of $27,500 for the period September 1984 to July 1985 or a total of $55,000.

3. The $27,500 damages plus 100% or $55,000 be trebled to $165,000 at least against Defendants Sutliff and ACF Industries because of this arbitrary, capricious and bad faith breach of contract.

4. Order additional damages of $75,000 per year because of breach of the contract with ACF/Good to consider Plaintiff for future legal positions occurred including Staff Attorney and General Counsel.

5. That ACF Industries offer to Plaintiff Cummings

a. the consulting arrangement previously agreed upon wherein Plaintiff Cummings would do the intellectual property

work for the Railcar Divisions at an hourly rate to be negotiated not less than $50 per hour, with a written understanding that it is to last until Plaintiff Cummings reaches age 70, if he so desired, or

b. at Plaintiff Cummings' option an employee arrangement in a legal position as an employee at an amount to be negotiated not less than $75,000 per year with less experienced attorney Joe Moeller reporting to Plaintiff Cummings.

7. That a preliminary injunction issue against the future use of the legal services of Joe Moeller during the pendancy of this litigation unless and until option 3(a) or 3(b) is in operation for the benefit of Plaintiff Cummings.

8. And that a permanent injunction issue at the end of this litigation that the legal services of Joe Moeller not be used except and unless Plaintiff Cummings is acting as an employee per 3(b) or

consultant per 3(a).

9. An order of dmages due to outrageous conduct which caused emotional distress to the extent of expenses Plaintiff Cummings has incurred in utilizing the counseling services of Dr. Allan Zacker since the appointment of Polster, Polster and Lucchesi in August 1984.

10. And such further and additional rlief as the Court deems just and equitable.

11. A jury trial is requested.

Respectfully submitted,

Henry W. Cummings
Attorney for Plaintiff
3313 W. Adams Street
St. Charles, MO 63301
(314) 946-0076

ACF INDUSTRIES EXHIBIT 1
Incorporated

750 Third Avenue, New York, N.Y. 10017

(212) 986-8600 Cable Address ACFUSA

October 25, 1983

Mr. Henry W. Cummings

3313 West Adams Street

St. Charles, Missouri 63301

Dear Mr. Cummings:

Re: Consulting Agreement

This will confirm our agreement with regard to your engagement by ACF Industries, Incorporated hereinafter referred to as ACF as a consultant on an independent contractor basis commencing January 1, 1984.

You are to provide legal services to ACF including particularly its Amcar and/or Shippers Car Line Divisions (Railcar Divisions) relating to patent and trademark matters and such other matters as may be mutually agreed upon. It is understood that your services will be available from time to time as requested by ACF subject to your availability at such requested times.

For each hour you are engaged in the performance of services described above, ACF and/or Railcar Divisions shall pay you at an hourly rate of $50 per hour. In addition, you will be reimbursed for such expenses asbusiness travel (not including travel between your office and our offices), meals, lodging, and miscellaneous expenses including patent drawings as are necessary in connection with the performance of the required services. Unusual expenses are not to be incurred without prior approval of the patent counsel for ACF or Railcar Divisions. You will provide the patent counsel for ACF or Railcar Divisions with reports as may be requested from time to time concerning your activities on behalf of ACF and submit monthly invoices detailing your services and expenses for the preceding period covered by such invoices. Secretarial services if available from the patent department of the Railcar

Divisions may be utilized from time to time for Railcar patent matters.

ACF will provide sufficient employment for you to obtain a minimum of 600 hours or $30,000 for the calendar year 1984 under this agreement. In the event ACF does not provide such minimum employment, ACF and/or Railcar Divisions shall pay with its payment for your December invoice the difference between the amount received by you and such minimum amount.

In view ofthe confidential and unique nature of your relationship with ACF during the term of this or any ensuing consulting agreement with ACF, you agree not to disclose at any time, without authorization of ACF, during or for a period of one year subsequent to your retention by ACF as a consultant, any information, knowledge or data of ACF which you may obtain during such retention which is of a confidential classified or proprietary nature. This obligation does not apply to such information or data which has or may become generally

available to the public from sources other than yourself, or is acquired by you from a third party having a legal right to disclose the same. You also agree to assign to ACF Industries, Incorporated all inventions and improvements and all patents that may issue thereon which relate to the performance ofthis agreement and which are made or conceived by you (either solely or jointly with others) during your retention as a consultant by ACF.

While you are acting as consultant to ACF, you will receive the same Comprehensive General & Automobile Liability Insurance (this insurance does not cover your personally owned/leased automobile) as is made available to employees of ACF for activities performed on behalf of ACF.

This agreement, upon receipt by us of two (2) signed and dated copies of this letter, shall be effective as of January 1, 1984 and shall continue until December 31, 1984 unless terminated by mutual consent. This

agreement may be renewed or modified by mutual consent of the concerned parties. Please acknowledge your understanding and acceptance of this agreement by signing, dating, and returning to us two (2) copies of this letter.

Very truly yours

(Signed) James C. O'Hara

Group Vice President

Acknowledged and Agreed:

(Signed) Henry W. Cummings

Consultant date

10/31/83

Exhibit 2

Copies: ACF INDUSTRIES (ACF)

D. J. Corr

J.C. O'Hara

J.J. Mueller

D.E. Reese

To: E.N. Riddle From: H.W. Cummings

Subj. Reconsideration of Entry Into Private Practice

Sept. 22 1983

by lg

As you will recall, we have had some discussions concerning my entry into the private practice of law, and representing ACF as one of my clients.

A minimum of 600 hours per year at a minimum salary of $30,000 was suggested.

However, the present takeover situation has caused me to reconsider the situation.

It is possible that as a result of the takeover a decision will be made to dispense with either the Carter Carburetor business, or the Amcar sales to railroads. It has been suggested that from a purely economic point of view this would be a wise decision to take insofar as the profit loss statement of the company is concerned.

If either Amcar and/or Carter is sold or goes out of business there would be a serious question as to whether or not there would be sufficient work to justify the services of both myself and Joe Muller.

Even if a decision is made to buy out the takeover parties and continue business as usual, because of the added debt there will be even more pressure on non-profit making divisions to make a profit. After a certain period of time if they do not make a profit, their business activities will be ceased, and they will either be sold or simply go out of business.

My plans to enter private practice were based on the concept that for at least about five years it was very likely that there would be sufficient work to justify Joe Muller as Patent Counsel of both Carter Carburetor and the railcar divisions, and my work as an independent contractor.

However, with the above identified takeover situation in view, and for the reasons indicated above, it is apparent that a five year period is much more suspect than prior tothe takeover.

It is for this reason that I am hereby advising you that until such time as the results of the takeover are more clearly apparent, I am suspending negotiations concerning entry into private practice, and plan to remain an ACF corporate employee until such time as it is more apparent what the after takeover situation will be.

I would stress that I have a family to support, and I wish to send my daughters to college. When I felt that it was likely that the Carter Amcar situation would continue for at least five years I felt reasonably confident that in that period of time I could develop sufficient clientele whereby if a decision were made to close Amcar

or Carter, I would have sufficient income to stand on my own two feet.

With the present situation, a five year period cannot be predicted, and only time will tell what the new after takeover situation will be.

(Signed) Henry W. Cummings

Henry W. Cummings
Attorney at Law
3313 West Adams
St. Charles, MO
63301 EXHIBIT 3

Telephone 314-946-0076

E.N. Riddle, Esq., October 24, 1983.
Corproate Patent counsel
ACF Industries, Inc.
750 Third Avenue
New York, NY 10017

Re: Contract for Private Practice
Calendar 1984

Dear Gene:

As you will recall, on September 6, 1983, I advised you that if a suitable contract could be worked out I would prefer to represent ACF in 1984 as a private practitioner rather than as a corporate employee. We agreed upon a minimum retainer of $30,000 which would include 600 hours at $50 per hour as a minimum figure.

However, this was contingent upon the acceptance of this understanding by tthe Personnel Department in New York and

by the Chief Executive Officer. You have advised me that they have both approved the agreement.

Today, however, October 24, 1983, you advised me that the Rail Car Division management had not approved the agreement and had sent it back to you for further consideration.

You will also recall that I had expressed some reticence to proceed with the agreement because of the purported takeover by Mr. Icahn. My reticence was because I was uncertain that there would be enough work for both Joe Moeller and myself should Carter Carburator's operations be greatly reduced or eliminated, and with Icahn's propensity for eliminating unprofitable business areas this seemed to be a real possibility. See attached draft dated 9/22/83.

Now that, as I understand it, both Joe Corr and Jim O'Hara have some reticence

about the agreement, I believe that at least at this point there is a lack of agreement of the principals whose consent the basic agreement was contingent upon.

I would also like to add that rather than have a one year agreement I believe that a three to five year agreement would be more appropriate. A one year agreement provides little protection for my wife and family at a time when the future of ACF is in some question.

I would stress to you that I have not resigned from ACF and do not plan to do so in the absence of a suitably executed agreement between ACF and myself.

As you are aware, I have represented the Rail Car Divisions effectively for eleven years and even this year I have developed important defenses insofar as the articulated cars for the Burlington Northern are concerned, and more recently with respect to the North American Car patent which, perhaps, could be construed

as including our recently developed 15 psi car.

You will specifically recall that I conditioned my agreement to go into private practice on acceptance by the Rail Car Management and execution by them of the agreement. Since it is now apparent that the Rail Car Management has reservations concerning our proposed arrangement, I believe we must all reconsider the arrangement at this time.

I am sure you agree that our plans for a longstanding arrangement of my representation of the Rail Car Divisions as an independent contractor is dependent upon the enthusiastic endorsement and support of the Rail Car Management. Unless and until this becomes a reality I believe I must remain an employee of ACF.

Sincerely yours,

(Signed) Henry W. Cummings

Copies to: J.D. Corr

J.C. O'Hara

J.J. Moeller

George Reed

Walter O'Leary

D.E. Reese

HWC/cc

Copies to: R.F. Allen Amcar Division

D.E. Reese EXHIBIT 4

To: Mr. H.W. Cummings From: D.R. Sutliff

Date August 27, 1984

Subj. Consultant Agreement

Your services as a consultant to the Amcar Division Patent Department are to end on the close os business Monday, August 27, 1984. Please submit your final bill authorized under Amcar Purchase Order 7-1599-84. Should this final bill not fulfill Amcar's contractual obligations to you of a minimum of 600 hours @ $50.00 per hour, Amcar will make up the difference per the contract upon receipt of your final invoice.

(Signed) D.R. Sutliff

Attorney at Law St. Charles, MO 63301

Telephone 314-946-0076

January 21, 1985 EXHIBIT 5

Dr. David Sutliff

ACF Industries, Inc.

3301 Rider Trail South

Earth City, MO 63045-1393

Dear David:

This is an update of events which have occurred since we've talked last.

My wife, Catherine, is now working as an administrative assistant in the Olin Library at Washington University.

In addition, as you are probably aware, we have a beautiful, low interest home in St. Charles. We therefore do not wish to relocate.

During 1984, I won three of five trials. This fall I won a St. Louis City Court case and won a Circuit Court criminal trial in the City of St. Louis.

In Federal Court I lost a landlord/tenant jury trial. However, my original recommendation to the clients was to not try this case because of the marijuana growing in the apartment and drug paraphernalia found in the apartment.

In addition to the above trials, I handled two semi-formal non-patent administrative law hearings which are common practice in Federal agencies.

In another case, the U.S. Supreme Court asked the other side to answer the Petition for Certiorari. However, Certiorari was eventually denied.

I point out these items to you because I feel more strongly than ever that a large part of technical and/or intellectual property matters could be litigated by myself with the assistance only of local counsel in the area where the litigation would take place. Litigation could thus be handled inexpensively and expeditiously.

I am now working on another very important patent infringement matter which may have to be litigated.

As far as general law is concerned, I am litigating my second negligence case.

I have litigated several child custody matters and many criminal matters.

With this background I definitely believe that I can provide legal and technical services to ACF Industries. I have both patent and general legal experience which is rarein the job market.

In addition, I understand the ACF rail product line and am aware of pertinent patents and other information in the files to effectively represent ACF in both intellectual property and general legal matters.

From the personal stand point, my proposal of litigating some or all of the intellectual property matters conflicted with the philosophy of Gene Riddle. To prepare myself

for this responsibility I have audited Evidence, Civil Procedure and Trial Practice in Evening Law School. I attended a one week Trial Practice Participation Seminar put on by the American Trial Association in St. Louis. Therefore, I am well qualified to litigate or supervise litigation of such matters.

I would welcome the opportunity to represent ACF in a manner which is consistent with the education and experience which I now possess.

Sincerely yours,

(Signed) Henry W. Cummings

Attorney-at-Law

HWC/cc

cc: R.F. Allen
Irma Beckley
D.J. Corr
W.E. O'Leary
J.F. McCarthy
Henry Parrish

ACF INDUSTRIES INC.

3301 Rider Trail South, Earth City

Missouri 63045-1393 (314) 344-4200

James C. O'Hara

President

July 9, 1986

EXHIBIT 6

Mr. Henry W. Cummings

Attorney at Law

3313 West Adams Street

St. Charles, MO 63301

Dear Henry:

Thank you for your letter of July 3, 1986 wherein you request that ACF employ you as an attorney or use your services as an outside attorney from time to time.

At the present time our legal matters are handled by a full-time member of our member of our staff and by a continued relationship with the firm of Hardy, Peal, Rawlings, Werner and Coogan in New York. In addition, we employ the services of local firms and attorneys from time to time on special matters.

Although it is not our intention to employ more than one full-time attorney on our staff, I will advise our staff attorney, Joe Muller, of your interest in doing work as an outside attorney.

Again, Henry, thank you for your continued interest in ACF and best wishes for the continued growth of your private practice.

Sincerely,

(Signed) James C. O'Hara

JCO:as

ACF INDUSTRIES INC.
3301 Rider Trail South, Earth City, MO 63045-1393
(314) 344-4500

October 14, 1986 EXHIBIT 7

Mr. Henry W. Cummings
3313 West Adams
St. Charles, Missouri 63301

Dear Henry:

Over the past several months, you have sent letters to me, Jim O'Hara and Dave Sutliff. Prior to this, you had written Joe Corr and Bob Allen neither of whom are at Earth City any longer. In each instance, you have asked for some type of employment and insinuated some type of obligation on ACF's part to either employ you or pay you some money you believe due under the October 25, 1983 consultant's agreement you entered into with ACF.

Henry, there is no job for you at ACF, either now or in the foreseeable future.

Further, Henry, with respect to the consultant's agreement, I have reviewed the Agreement

and the files related to it and have concluded that ACF has no on-going legal, equitable or moral obligation to you as a result of it.As you well know, the October 25, 1983 Agreement was drawn up after you had decided to leave ACF in order to go into private practice. The Agreement, which was for one year only unless renewed by mutual consent of both parties, served both as an accommodation to you (to provide you a $30,000 income while you made the transition into private practice) and as a benefit to ACF (so we could draw on your knowledge of ACF's patent matters). All monies due you for the services you rendered ACF under the Agreement and your related expenses were promptly paid to you when you invoiced us. Overall, ACF believes it made a reasonable bargain with you and treated you fairly. Granted, ACF chose not to renew the Agreement, but we were clearly within our rights under the Agreement not to renew. For you to assert, as you

continually do, that ACF has some on-going obligation to you misstates the facts and is simply not true.

If your long term situation has not worked out as you had expected, Henry, that is unfortunate. However, that is a risk you assumed when you chose to leave. While we may be sorrythings did not go as well for you as you had hoped; we do not, at the same time, have any past or current obligation to you.

Very truly yours,

(Signed) J. Joseph Muller

General Counsel

Supreme Court, U.S.
FILED
MAY 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY W. CUMMINGS,
Petitioner,

vs.

ACF INDUSTRIES, INC., DAVID SUTLIFF, PEGGY GOOD, JAMES C. O'HARA,
Respondents.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN S. STEINER
MANN, POGER, WITTNER & HEREFORD, P.C.
7711 Carondelet, Suite 400
St. Louis, MO 63105
(314) 862-3535

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

IN THE

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vs.

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PEGGY GOOD, JAMES C. O'HARA,
Respondents.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MEMORANDUM OPPOSING CERTIORARI

This case arose out of a dispute which involved the claim of Petitioner, Henry W. Cummings for employment by Respondent, ACF Industries Incorporated and for damages for the failure of Respondent to employ Petitioner.

None of the questions presented by the Petitioner are covered by Rule 17 of the Court.

Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

John S. Steiner
Mann, Poger, Wittner & Hereford
7711 Carondelet, Suite 400
St. Louis, MO 63105
(314) 862-3535

Attorneys for Respondent

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1631

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

HENRY W. CUMMINGS

PETITIONER

v.

ACF INDUSTRIES ET AL

RESPONDENTS

PETITIONER'S REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY W. CUMMINGS
3313 W. Adams Street
St. Charles,MO 63301
(314) 946-0076
(314) 232-6369
Attorney for Petitioner

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A. TABLE OF THE AUTHORITIES

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FEDERAL RULE CIVIL PROCEDURE 8

FEDERAL RULE OF CIVIL PROCEDURE 15

MISSOURI SUPREME COURT RULE 55.05

MISSOURI SUPREME COURT RULE 55.33

Bishop v. Wood 426 U.S. 341

Board of Reagents v. Roth 408 U.S. 564

Bodie v. Conn. 401 U.S. 371 (1971)

Cleveland Board of Ed. v. Loudermill 470 U.S. 532 (1985)

Conley v. Gibson 355 U.S. (1957)

Foman v. Davis 371 U.S. (1962)

Little v. Streater 452 U.S. (1981)

No. 88-1631

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

HENRY W. CUMMINGS

PETITIONER

v.

ACF INDUSTRIES ET AL

RESPONDENTS

PETITIONER'S REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. While respondents state that none of the questions presented by the petitioner are covered by Rule 17 of the court, respondents overlook the plain language of Rule 17 which states "The following while neither controlling or fully measuring the court's discretion indicate the character of the reasons that will be considered."(Emphasis added). It is thus

apparent that sub-paragraphs (a)-(c) of Rule 17 are not controlling as to whether or not the petition is in compliance with Rule 17.

2. Moreover, section (c) of Rule 17 is directed to a situation where "a state court has decided a federal question in a way in conflict with applicable decisions of this Court."

3. Petitioner has been denied due process of law and equal protection of the laws under the applicable Rules of Civil Procedure. See Cleveland Board of Ed. v. Loudermill 470 U.S. 532 (1985); Bishop v. Wood 426 U.S. 341; Board of Reagents v. Roth 408 U.S. 564; Bodie v. Conn. 401 U.S. 371 (1971); Little v. Streater 452 U.S. (1981).

4. Concerning petitioner's question #2 concerning whether or not plaintiff's original petition, failed to state a claim upon which relief could be granted; Missouri Supreme Court Rule 55.05 is very similar to Federal Rule of Civil Procedure 8 and involves the same basic principal of federal law.

5. As stated by this court in Conley v.

Gibson, 355 US 41, 47, 78 S.Ct 99, 2 L ed2d 80,(1957), "all the rules require is a short, plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." It is believed that a brief review by the court of petitioner's original complaint will reveal that this test was met concerning allegations of two breaches of contract in Pars. 30, 32, 34, 36, 39, 41, and 43 in the original complaint. It therefore was clearly wrong and contrary to Conley v. Gibson for the trial court to dismiss the complaint for failure to state a claim upon which relief could be granted and for the Missouri Court of Appeals to affirm this dismissal. Petitioner had no other choice but to move to transfer to the MO Supreme Court, and when that motion was denied, petition to this court for due process and equal protection of the laws under applicable decisions of this court.

6. Concerning petitioner's point #1,

Missouri Supreme Court Rule 55.33 is very similar to Federal Rule of Civil Procedure 15 which provides that a party may amend his pleading by leave of court and leave shall be freely given when justice so requires.

7. In Foman v. Davis 371 U.S. 78, 83 SCt 227, 9 L ed2d 222 (1962); this court stated the philosophy that amendments of the pleadings are to be freely granted even after a complaint has been dismissed. The court said "Rule 15a declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. If the underlying facts or circumstances relied on by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits"---"outright refusual to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the federal rules". This is exactly what happened to plaintiff's petition. The claim

was dismissed as failing to state a claim upon which relief could be granted, and leave to file an amended complaint was denied.

8. Briefly the changes and additions in the amended petition were to place the two breach of contract allegations in separate counts, which was requested by the Trial Court (Count I Pars. 7-45; Count II Pars. 46-59); the addition of the negotiation allegations in Pars. 24-30 and Exhibits 2 & 3; the allegations in paragraph 35 and 38 of the long term agreement for plaintiff to do the intellectual property work for ACF; the allegation of ACF's negligence in paragraph 41; the allegations of mutual consideration in Count II, Paragraph 48; specific allegations of petitioner's better background in Par. 54 including Law Review in evening law school and experience at the U. S. Patent Office; and the allegation of outrageous conduct in Par. 59.

9. Leave should have granted by the trial court to file an amended complaint since the case was not in the discovery stage and was not

set for trial. Defendants would not have been unfairly prejudiced by such an amended complaint. This was a clear violation of the doctrine sent down by this court in Foman v. Davis.

10. The reason petitioner is before this court is because of the failure of the Missouri Trial Court and Missouri Court of Appeals to follow these well-known and fundamental principles, which is a denial of due process and equal protection of the laws.

11. On this basis alone, it is believed that it is appropriate for this court to summarily reverse (Rule 23.1) the judgment of the Missouri Court of Appeals and hold that Petitioner's original claim stated a claim upon which relief could be granted, and that petitioner had a right to file an amended complaint with the additional allegations and exhibits referred to above. This will take little of the court's time and yet will correct clear injustice and abuse in lower courts. Respondents have not contended otherwise in their brief.

12. Alternatively, Court should grant certiorari and set the case down for briefing and oral argument wherein the merits of plaintiff's petition will be even more apparent to this court.

13. Sub-section (a) of Rule 17 describe a situation when a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower court as to call for an exercise for this court's power of supervision.

14. With the phrase in the first paragraph of Rule 17, "while neither controlling nor fully measuring the court's discretion," it is believed that sub-paragraph (a) should be read in coniunction with sub-paragraph (c). The supervisory authority should equally apply to a state court which has so far departed from the accepted and usual course of traditional proceedings and/or has sanctioned such a departure by a lower court as to warrant this Court's supervision.

15. It is believed that when Rule 17 is read in its entirety and is compared with the facts which the present case presents, it is appropriate that this court grant certiorari and summarily reverse the Missouri Court of Appeals under its supervisory authority. Alternatively the court should grant certiorari and set the case down for brief and oral arguments so that the court may more fully understand the manner in which the Trial Court and the Missouri Court of Appeals have departed from the accepted and usual course of judicial proceedings, and denied petitioner due process and equal protection of the laws.

Respectfully submitted,

Henry W. Cummings

Henry W. Cummings
Attorney for Petitioner

It is certified that three copies of this REPLY BRIEF IN OPPOSITION have been mailed this 14th day of May 1989 to Mann, Poger, Wittner & Hereford, P. C. 7711 Carondelet Ste. 400 St. Louis, MO 63105 and to Ms. Peggy Good, Mr. Gary Reger, Dr. David Sutliff at 3301 Rider

Trail South Bridgeton, MO 63045 and to Mr. James C. O'Hara at 9889 Copper St. Louis, MO 63146.

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